MATAIR SUHAILI & ANOR A

v.

ROSE FOO CHIN LAN & ORS

COURT OF APPEAL, PUTRAJAYA B
MOKHTAR SIDIN JCA
JAMES FOONG JCA
ZULKEFLI MAKINUDIN JCA
[CIVIL APPEAL NO: Q-02-693-2002]
6 AUGUST 2007 C

LAND LAW: *Sale of land - Rescission - Whether agreement for sale of land validly rescinded - Inequitable conduct - Restitutio in integrum - Whether subsequent agreement to sell land valid - Removal of caveat - Rights and interests of other parties involved in dispute - Beneficial ownership* D

CONTRACT: *Sale and purchase of land - Rescission - Whether agreement for sale of land validly rescinded - Inequitable conduct - Restitutio in integrum - Whether subsequent agreement to sell land valid - Removal of caveat - Rights and interests of other parties involved in dispute - Beneficial ownership* E

These were three appeals, the first being the substantive appeal by the plaintiffs, the other two being the cross-appeals by the 1st defendant and the 2nd to 7th defendants respectively, in relation F to a sale and purchase agreement for a parcel of land ('said land') dated 29 August 1981 entered into between the 1st plaintiff, the registered proprietor of the said land, and the 1st defendant, the purchaser ('1st agreement'). The 1st plaintiff alleged that the 1st defendant had breached the 1st agreement and subsequently, on G 22 July 1991, entered into another agreement to sell the said land to the 2nd plaintiff ('2nd agreement'). The 1st defendant lodged a caveat on the said land and the 2nd to 7th defendants, by virtue of an unregistered memorandum of transfer purportedly executed by the 1st plaintiff on 13 January 1983 ('MOT'), did the same. H The 1st plaintiff prayed for: (i) as against the 1st defendant, a declaration that the 1st agreement had been validly rescinded, or alternatively, for an order of rescission of the 1st agreement; (ii) as against the 2nd to 7th defendants, a declaration that the MOT was null and void; (iii) a declaration that the 2nd to 7th I defendants did not have any interest in the said land; (iv) an order that the caveat lodged by the 1st defendant be removed

forthwith; (v) an order that the caveat lodged by the 2nd to 7th defendants be removed forthwith; and (vi) an order that the 1st defendant or 2nd to 7th defendants or any one or more of them having custody of the issue document of title to the said land, do deliver the document of title to the 1st plaintiff within 14 days from the date of the order. The 2nd plaintiff prayed for a declaration that he was beneficially entitled to the said land by virtue of the 2nd agreement.

The learned trial judge made the following findings: (a) that the MOT was void as against public policy on the ground that it was an illegal dealing to evade real property gains tax and that both the 1st defendant and the 2nd to 7th defendants were parties to it; (b) that the MOT did not pass any interest to the 2nd to 7th defendants as a result thereof; (c) that the 1st agreement was validly terminated by the 1st plaintiff; and (d) that the 2nd agreement was not a conditional agreement. The learned judge, however, did not order the removal of the caveats on the said land. The plaintiffs raised the following issues: (i) that the learned judge erred in law in refusing to declare the 1st agreement validly rescinded. Although the learned judge found that the 1st defendant had breached the 1st agreement and that it had been validly terminated by the 1st plaintiff by letter dated 29 July 1991, he refused to grant the order of declaration sought by the plaintiffs on the ground that the conduct of the 1st plaintiff was inequitable in that the 1st plaintiff failed to inform the other defendants that the balance of the purchase money had not been paid by the 1st defendant and that the 1st plaintiff delayed in terminating the 1st agreement; (ii) that the learned judge erred in refusing to remove the caveat lodged by the 1st defendant; and (iii) that the learned judge erred in refusing relief to the 2nd plaintiff. When the learned judge came to the conclusion that the 2nd agreement was not contingent on the 1st defendant's interest in the said land, he ought to have held that the 2nd plaintiff had a beneficial interest in the said land.

Held (allowing the appeal and dismissing the cross-appeals)
Per Mokhtar Sidin JCA delivering the judgment of the court:

(1) From the evidence, the claim by the other defendants was premised on a purported agreement between the 1st defendant and the other defendants. The 1st defendant's statement of defence and counterclaim denied any dealings

between the 1st defendant and the other defendants, and it could not be found anywhere in the statement of defence and counterclaim of the other defendants a challenge to that denial. Parties are bound by their pleadings and for that reason the other defendants could not have any claim to the said land. Secondly, the agreement between the 1st defendant and the other defendants (if any) would depend on whether there was a valid and binding agreement between the 1st plaintiff and the 1st defendant in respect of the said land. The learned trial judge held that the 1st agreement between the 1st plaintiff and the 1st defendant was void for want of consideration, and that the 1st plaintiff had validly terminated the 1st agreement. The said land was the subject matter of the 1st agreement and since it had been declared null and void the ownership of the land never passed to the 1st defendant. Therefore, the 1st defendant could not enter into any agreement with any party in respect of the said land. Whatever agreement entered into between the 1st defendant and the other defendants would have no effect whatsoever. Furthermore, there was nothing in the evidence to show that when the 1st defendant entered into the purported agreement with the other defendants, the 1st plaintiff was a party to the purported agreement. Thus, there was no obligation on the 1st plaintiff's part to inform the other defendants that the balance of the purchase money had not been paid. (para 15)

(1a) There was no evidence, on the facts of this case, to show that the 1st plaintiff's conduct was inequitable and that *restitutio in integrum* could not be ordered. Even if the learned judge were right in both findings, he was in error in not granting the declaratory order prayed for because the learned judge himself found that the 1st plaintiff himself had validly terminated the 1st agreement. The normal sequence of a finding that the 1st agreement had been validly terminated by the 1st plaintiff would be a declaratory order pronouncing that the agreement had been validly terminated. (para 17)

(2) The learned judge found that the 1st plaintiff had validly terminated the agreement when the 1st plaintiff's solicitors, by their letter dated 29 July 1991, rescinded the agreement for non-payment of the balance of the purchase price. With the termination of the said agreement, the interest of the 1st

defendant in respect of the land disappeared. For that reason the 1st defendant had no caveatable interest on the said land. The natural sequence would be an order that the caveat lodged by the 1st defendant should be removed. Hence, the learned judge was in error in refusing to remove the caveat filed by the 1st defendant. (paras 18 & 19)

(3) The learned judge was right in not making the declaratory order prayed for by the 2nd plaintiff. It was clear from the evidence that when the solicitors for the 1st plaintiff gave notice of termination to the 1st defendant, the 1st defendant disputed the termination. The termination became final only when the court found that the 1st plaintiff had validly terminated the 1st agreement for breach by the 1st defendant. The 2nd agreement between the 1st plaintiff and the 2nd defendant was dated 22 July 1991 and on that date, the 1st agreement was still subsisting until it was held by the court to be validly terminated by the 1st plaintiff. For that reason, the 1st plaintiff could not enter into any agreement with any party including the 2nd plaintiff, and the 2nd plaintiff had no cause of action against the defendants. (paras 21 & 23)

Bahasa Malaysia *translation of headnotes*

Ini adalah tiga rayuan, iaitu pertama rayuan substantif oleh plaintif-plaintif dan selebihnya adalah rayuan balas oleh defendan pertama dan defendan-defendan kedua hingga ketujuh masing-masingnya, berhubung satu perjanjian jual beli sebidang tanah ('tanah tersebut') bertarikh 29 Ogos 1981 yang dimeterai di antara plaintif pertama, pemilik berdaftar tanah tersebut, dan pembelinya, defendan pertama ('perjanjian pertama'). Plaintif pertama mendakwa bahawa defendan pertama telah memungkiri perjanjian pertama dan ekoran itu, pada 22 Julai 1991, telah memeterai satu perjanjian lain untuk menjual tanah tersebut kepada plaintif kedua ('perjanjian kedua'). Defendan pertama memasukkan kaveat terhadap tanah tersebut, dan defendan-defendan kedua hingga ketujuh juga bertindak serupa berasaskan kepada satu memorandum pindahmilik yang tidak didaftar yang dikatakan telah dimeterai oleh plaintif pada 13 Januari 1983 ('MOT'). Plaintif pertama memohon: (i) terhadap defendan pertama, deklarasi bahawa perjanjian pertama telah dibatalkan, atau secara alternatifnya satu perintah membatalkan perjanjian pertama; (ii) terhadap defendan-defendan kedua hingga

ketujuh, deklarasi bahawa MOT adalah batal dan tak sah; (iii) suatu deklarasi bahawa defendan-defendan kedua hingga ketujuh tidak ada sebarang kepentingan ke atas tanah; (iv) suatu perintah bahawa kaveat yang dimasukkan oleh defendan pertama dikeluarkan dengan serta merta; (v) suatu perintah bahawa kaveat yang dimasukkan oleh defendan-defendan kedua hingga ketujuh dikeluarkan dengan serta merta; dan (vi) suatu perintah bahawa defendan pertama atau defendan-defendan kedua hingga ketujuh atau mana-mana satu dari mereka yang mempunyai geran hakmilik tanah tersebut supaya menyerahkannya kepada plaintif pertama dalam masa 14 hari dari tarikh perintah. Plaintif kedua memohon deklarasi bahawa beliau berhak kepada tanah tersebut berdasarkan kepada perjanjian kedua.

Yang arif hakim bicara telah membuat dapatan-dapatan berikut: (a) bahawa MOT batal dan bertentangan dengan polisi awam kerana ia adalah urusan haram untuk mengelak cukai keuntungan harta tanah dan kerana kedua-dua defendan pertama dan defendan-defendan kedua hingga ketujuh adalah pihak-pihak kepadanya; (b) bahawa disebabkan itu MOT tidak memberi apa-apa kepentingan kepada defendan-defendan kedua hingga ketujuh; (c) bahawa perjanjian pertama telah ditamatkan secara sah oleh plaintif pertama; dan (d) bahawa perjanjian kedua bukanlah suatu perjanjian bersyarat. Yang arif hakim, bagaimanapun, tidak memerintahkan kaveat-kaveat dikeluarkan dari tanah tersebut. Plaintif-plantif telah membangkitkan isu-isu berikut: (i) bahawa yang arif hakim khilaf di sisi undang-undang kerana tidak mengisytiharkan bahawa perjanjian pertama telah dibatalkan secara sah. Walaupun yang arif hakim mendapati defendan pertama telah memungkiri perjanjian pertama dan bahawa perjanjian itu telah ditamatkan secara sah oleh plaintif pertama melalui surat bertarikh 29 Julai 1991, beliau enggan membenarkan perintah deklarasi yang dipohon oleh plaintif-plaintif atas alasan bahawa tingkah laku plaintif pertama adalah tidak berekuiti dalam ertikata plaintif pertama gagal memberitahu defendan-defendan yang lain bahawa baki harga belian telah tidak dibayar oleh defendan pertama dan bahawa plaintif pertama telah menangguhkan penamatan perjanjian perjanjian; (ii) bahawa yang arif hakim khilaf kerana enggan mengeluarkan kaveat yang dimasukkan oleh defendan pertama; dan (iii) bahawa yang arif hakim khilaf kerana enggan memberi relif kepada plaintif kedua. Dihujahkan bahawa, apabila yang arif hakim

A mencapai konklusi bahawa perjanjian kedua tidak tertakluk kepada kepentingan defendan pertama ke atas tanah tersebut, beliau sepatutnya memutuskan bahawa plaintif kedua mempunyai kepentingan benefisial atas tanah tersebut.

B **Diputuskan (membenarkan rayuan dan menolak rayuan-rayuan balas)**
Oleh Mokhtar Sidin HMR menyampaikan penghakiman mahkamah:

C **(1)** Dari keterangan, tuntutan defendan-defendan yang lain adalah diasaskan kepada perjanjian yang dikatakan dimeterai di antara defendan pertama dan defendan-defendan yang lain tersebut. Penyata pembelaan dan tuntutan balas defendan pertama menafikan sebarang urusan di antara defendan pertama dengan defendan-defendan yang lain dan penafian ini
D langsung tidak dicabar oleh penyata pembelaan dan tuntutan balas defendan-defendan yang lain. Pihak-pihak adalah terikat dengan pliding mereka dan atas alasan ini defendan-defendan yang lain tidak boleh menuntut apa-apa dari tanah tersebut. Kedua, perjanjian di antara defendan pertama dan defendan-
E defendan yang lain (jikapun wujud) akan bergantung kepada sama ada terdapat suatu perjanjian yang sah dan mengikat di antara plaintif pertama dan defendan pertama berkaitan tanah tersebut. Yang arif hakim bicara memutuskan bahawa
F perjanjian pertama di antara plaintif pertama dan defendan pertama adalah batal kerana ketiadaan balasan, dan bahawa plaintif pertama telah menamatkan perjanjian pertama dengan sahnya. Tanah tersebut menjadi pokok perkara perjanjian pertama dan oleh kerana ia telah diisytiharkan sebagai tak sah
G dan batal maka keempunyaan tanah tidak pernah berpindah kepada defendan pertama. Oleh yang demikian, defendan pertama tidak boleh memeterai apa-apa perjanjian dengan mana-mana pihak berkaitan tanah tersebut. Apa-apa perjanjian yang dimasuki di antara defendan pertama dengan
H defendan-defendan yang lain adalah tidak mempunyai apa-apa kesan. Selain itu, tiada keterangan yang menunjukkan bahawa sewaktu defendan pertama memeterai perjanjian yang dikatakan itu dengan defendan-defendan lain, plaintif merupakan pihak kepada perjanjian tersebut. Dengan itu,
I tiada obligasi di pihak plaintif pertama untuk memberitahu defendan-defendan lain bahawa baki harga belian telah tidak dibayar.

(1a) Berdasarkan fakta kes di sini, tidak ada keterangan yang menunjukkan bahawa tingkah laku plaintif pertama adalah tidak berekuiti dan bahawa *restitutio in integrum* tidak boleh diperintahkan. Jikapun yang arif hakim betul dalam kedua-dua dapatannya, beliau khilaf dalam membenarkan perintah deklarasi yang dipohon kerana yang arif hakim sendiri mendapati bahawa plaintif pertama sendiri telah menamatkan perjanjian pertama secara sah. Akibat yang menurut dari dapatan bahawa perjanjian pertama telah ditamatkan secara sah oleh plaintif pertama adalah perintah deklarasi mengisytiharkan bahawa perjanjian itu telah ditamatkan dengan sahnya.

(2) Yang arif hakim mendapati bahawa plaintif pertama telah menamatkan perjanjian secara sah apabila peguamcara plaintif pertama, melalui surat bertarikh 29 Julai 1991, membatalkan perjanjian atas kegagalan membayar baki harga belian. Dengan penamatan perjanjian tersebut, kepentingan defendan pertama berkaitan tanah tersebut menjadi terhapus. Atas alasan ini, defendan pertama tidak mempunyai apa-apa kepentingan berkaveat ke atas tanah tersebut. Akibat biasa yang menurut dari ini adalah suatu perintah bahawa kaveat yang dimasukkan oleh defendan pertama harus dikeluarkan. Oleh itu, yang arif hakim khilaf apabila enggan mengeluarkan kaveat yang difailkan defendan pertama.

(3) Yang arif hakim betul dalam tidak membuat perintah deklarasi yang dipohon oleh plaintif kedua. Adalah jelas dari keterangan bahawa apabila peguamcara plaintif pertama memberi notis penamatan kepada defendan pertama, ianya telah dipertikai oleh defendan pertama. Penamatan hanya menjadi muktamad apabila mahkamah memutuskan bahawa plaintif pertama telah menamatkan perjanjian pertama secara sah atas kemungkiran defendan pertama. Perjanjian kedua di antara plaintif pertama dan defendan kedua adalah bertarikh 22 Julai 1991 dan pada tarikh itu, perjanjian pertama masih wujud sehinggalah ia diputuskan oleh mahkamah sebagai telah ditamatkan dengan sahnya oleh plaintif pertama. Atas alasan ini, plaintif pertama tidak boleh memeterai apa-apa perjanjian dengan mana-mana pihak termasuklah plaintif kedua, dan plaintif kedua, dengan itu, tidak mempunyai kausa tindakan terhadap defendan-defendan.

A *For the appellants - Mekanda Singh Sandhu (Satinder Singh Sandhu with him); M/s Sandhu & Co*
For the 1st respondent - CT Voon; M/s Voon & Company
For the 2nd-7th respondents - KY Lin; M/s Kadir, Wong, Lin & Co

[Appeal from High Court, Miri; Suit No: MR 44-1992]

B *Reported by Suresh Nathan*

JUDGMENT

C

Mokhtar Sidin JCA:

[1] We have allowed the appeal and dismissed the two cross-appeals earlier and we now give our reasons for doing so. We will refer to the parties as they were in the court below.

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[2] In their re-amended statement of claim the plaintiffs stated, *inter alia*, as follows:

1. The 1st plaintiff is, and was at material times, the registered proprietor of all that parcel of land situate at Luak, Miri containing an area of 6596 square metres (1.63 acres), more or less, and described as Lot 2676 Lambir Land District (hereinafter referred to as "the said land").

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2. By an agreement in writing dated the 29th day of August, 1981, the 1st Plaintiff agreed to sell and the 1st Defendant agreed to purchase the said land upon the terms and conditions, *inter alia*, as follows:

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(a) that as consideration of the sale, the 1st Defendant shall:

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i) transfer her motor car Mazda 323 No. MB 1630 to the 1st Plaintiff;

ii) hand over one rice mill to the 1st Plaintiff;

iii) pay to the 1st Plaintiff the total sum of $11,000.00 in cash, made up of $4,000.00 which was stated to have been paid and a further sum of $7,000.00 upon signing;

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iv) shall discharge the 1st Plaintiff's indebtedness of $5,000.00 or thereabouts to the Labour Department under the aforementioned Caveat No. L.1119/1967.

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(b) upon signing, the 1st Plaintiff shall simultaneously execute a valid and registrable Memorandum of Transfer of the said land in favour of the Purchaser or her nominee/nominees.

3. Pursuant to the said agreement, the 1st Plaintiff executed a valid and registrable Memorandum of Transfer in favour of the 1st Defendant, and, handed over to her, the issue document of title to the said land.

4. In breach of the said agreement and despite repeated demands, the 1st Defendant did not in fact pay the said sum of $4,000.00 stated therein to have been paid and the further sum of $7,000.00, or alternatively $5,000.00, mentioned in paragraph 2(a)(iii) hereinabove.

5. Further, in breach of the said agreement, the 1st Defendant failed and still fails to discharge the 1st Plaintiff's indebtedness of $5,000.00 mentioned in paragraph 2(a)(iv) hereinabove.

5A. The 1st Plaintiff avers that on the 22nd day of May, 1996 he was induced by the 5th Defendant to sign certain documents and to accept the sum of RM13,000.00 in full discharge of the balance of the purchase price owed by the 1st Defendant by fraudulently misrepresenting to him that the 2nd Plaintiff had settled his claims herein against the Defendants. By reason of the aforesaid conduct of the 5th Defendant, the Defendants are estopped or precluded from claiming that the 1st Defendant had complied with all the conditions of the said sale and purchase agreement.

6. Although the 1st Defendant was in breach of the said agreement as aforesaid, the 1st Defendant by her advocates, Mr. Yee Shin Ching, lodged a Caveat *vide* Instrument No. L. 6729/1991 registered on the 17th day of October, 1991.

7. By a letter dated 29th November, 1991, by his solicitors, Messrs Khoo & Company, the 1st Plaintiff, as he was entitled to, elected to rescind, the said agreement with the 1st Defendant.

8. On the 4th day of March, 1992, the 2nd to 7th Defendants lodged a Caveat against the said land, registered as Instrument No. L. 1544/92 under and by virtue of an unregistered Memorandum of Transfer purportedly executed by the 1st Plaintiff on the 13th day of January, 1983.

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9. Under the said unregistered Memorandum of Transfer, the 1st Plaintiff purportedly received a sum of $80,000.00 as consideration for the sale of the said land to the 2nd to 7th Defendants.

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10. The 1st Plaintiff did not at any time have any dealings with the said 2nd to 7th Defendants and, if the said Memorandum of Transfer was executed by the 1st Plaintiff (which is denied), it was without knowing the true intent or purport thereof.

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11. Further, the 1st Plaintiff did not receive the said consideration of $80,000.00 or at all mentioned in the said unregistered transfer.

11A. By a Notice dated the 18th day of November, 1992, issued by the Assistant Registrar of the Land & Survey

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Department, Miri the 2nd Plaintiff was notified that the 2nd to the 7th Defendants had applied for the registration of the aforesaid unregistered Memorandum of Transfer.

11B. The Plaintiffs aver that the sale/transfer of the said land from the 1st Plaintiff to the 2nd to 7th Defendants by the said

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unregistered Memorandum of Transfer dated the 13th day of January, 1983 for the consideration of RM80,000.00 amounted to an evasion of real property gains tax on the part of the 1st Defendant and is illegal as it contravened the Real Property Gains Tax Act, 1976.

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12. By reason of the matters mentioned on in paragraphs 9, 10, 11A and 11B hereof, the said unregistered Memorandum of Transfer is null and void and of no legal effect, and, no interest by virtue thereof passed to the 2nd to 7th Defendants.

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13. Further or alternatively, by reason for the matters in paragraphs 4 and 5 hereof, the sale of the said land by the 1st Defendant to the 2nd and 7th Defendants referred to in paragraph 11 hereinabove was ineffective to pass any interest to the 2nd and 7th Defendants.

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14. By an agreement in writing dated the 22nd day of July, 1991 made between the 1st Plaintiff of the one part and the 2nd Plaintiff of the other part, the 1st Plaintiff agreed to sell the said land to the 2nd Plaintiff upon the terms and conditions as follows:

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(a) the purchase price shall be the sum of $80,000.00 payable as follows:

(i) $5,000.00 as deposit and part payment upon signing thereof; and

(ii) the balance sum of M$75,000.00 to be paid upon valid registration for the Memorandum of Transfer in favour of the 1st Plaintiff; and

(b) upon signing, the 1st Plaintiff shall simultaneously execute a valid and registrable Memorandum of Transfer in favour of the 2nd Plaintiff or his nominees in respect of the said land.

15. Pursuant to the said agreement, the 2nd Plaintiff paid the deposit of $5,000.00 to the 2nd Plaintiff and the 1st Plaintiff executed a Memorandum of Transfer in favour of the 2nd Plaintiff.

16. By virtue of the matters mentioned in paragraphs 14 and 15 hereinabove, the 2nd Plaintiff became and still is beneficially entitled to the said land.

17. On the 23rd day of July, 1991, the 2nd Plaintiff as he was entitled to by reason of the said agreement, lodged a Caveat against the land which was registered at the Miri Land Registry Office as Instrument No. L. 4588/1991.

18. At the time the 2nd Plaintiff lodged the said Caveat, there was no interest registered in favour of the 2nd to 7th Defendants and the 2nd Plaintiff had no notice at all of the interest, if any, of the 2nd to 7th Defendants in the said land.

19. In the premises, and as *bona fide* purchaser for value of the said land, the 2nd Plaintiff obtained an interest therein which ranked in priority over the interest, if any, of the 2nd to 7th Defendants.

I. AND the 1st Plaintiff prays for:

(1) as against the 1st Defendant, a declaration that the agreement dated the 29th day of August, 1981 made between the 1st Plaintiff and the 1st Defendant has been validly rescinded; or alternatively, for an order of rescission of the said agreement;

(2) as against the 2nd to 7th defendants, a declaration that the unregistered Memorandum of Transfer dated the 13th day of January, 1983 is null and void;

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(3) a declaration that the 2nd to 7th Defendants do not have any interest in the said land;

(4) an order that the Caveat lodged by the 1st Defendant against the said land and registered at the Miri Land Registry Office on the 17th day of October, 1991 as
B Instrument No. L. 6729/91 be removed forthwith;

(5) an order that the Caveat lodged by the 2nd to 7th Defendants and registered at the Miri Land Registry Office on the 5th day of March, 1992 as Instrument
C No. L. 1544/92 removed forthwith;

(6) an order that, the 1st Defendant or 2nd to 7th Defendants or any one or more of them having custody of the issue document of title to the said land, do deliver the document of title to the 1st Plaintiff within 14 days
D from the date of the order;

(7) such further or other relief; and

(8) costs.

2. AND the 2nd Plaintiff prays for:
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i) a declaration that he is beneficially entitled in the said land under and by virtue of agreement dated the 22nd day of July, 1991 made between himself and the 1st Plaintiff;

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ii) a declaration that he has obtained an interest in the said land which ranks in priority over the interest, if any, of the 2nd to 7th Defendants;

iii) an order that the Caveat lodged by him and registered
G at the Miri Land Registry Office on the 23rd day of July, 1991 as Instrument No. L.4588/1991 shall not lapse by reason of the Notice No. 11/1992 dated the 18th day of September, 1992 served upon him by the Assistant Registrar, Land & Survey, Miri;

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iv) further or alternatively, for an order that the said Caveat be extended until after the hearing of this action;

v) such further or other relief;

vi) costs.

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[3] There are two statements of defence filed by the defendants. The first is the amended statement of defence of the 1st defendant and the second is the statement of defence of the rest of the defendants. The amended defence and counterclaim of the 1st defendant reads:

1. The 1st Defendant admits Paragraph 1 of the Amended Statement of Claim but shall contend that the 1st Plaintiff has divested himself of all beneficial interests in the said property under and by virtue of the Sale and Purchase Agreement dated 29th August, 1981 and now holds the legal title of the said property as bare trustee for the 1st defendant and/or her nominees.

2. Paragraphs 2 & 3 of the Amended Statement of Claim are admitted.

3. The 1st Defendant denies that she has breached the said Sale and Purchase Agreement as alleged or at all.

4. The 1st Defendant shall contend that the 1st Plaintiff is now estopped from alleging a breach of the terms of the said Sale and Purchase Agreement as the 1st Plaintiff has admitted to signing the same and to being bound by the provisions therein.

5. Paragraphs 5 and 6 of the Amended Statement of Claim are admitted but the 1st Defendant shall contend that the 1st Plaintiff's letter dated the 29th July, 1991 purporting to rescind the said Sale and Purchase Agreement was defective and ineffective in law.

5A. The 1st Defendant strictly has no knowledge of the allegations in Paragraph 5A of the Amended Statement of Claim and categorically says that she has no knowledge of and was not privy to the events leading to, and including, in itself, the alleged signing of certain documents on the 22nd day of July, 1996. The 1st defendant could not be estopped from insisting on her strict legal rights as a result of an act between the 1st Plaintiff and other third parties (other than the 1st Defendant) of which the 1st Defendant has no knowledge and was not privy thereto.

6. The 1st Defendant has no knowledge of the matters stated in Paragraphs 8 to 19 of the Amended Statement of Claim and puts the 1st and 2nd Plaintiffs to proof thereof.

6A. The 1st Defendant strictly denies Paragraph 11B of the Amended Statement of Claim and categorically denies she has had been, either intentionally or unintentionally, part of any attempts to evade provisions of the Real Property Gains Tax Act, 1976.

7. Save as is herein before specifically admitted or traversed the 1st Plaintiff denies each and every allegation contained in the Amended Statement of Claim as if the same were set out herein and traversed seriatim.

AMENDED COUNTERCLAIM

8. The 1st Defendant repeats Paragraphs 1 to 16 of the Amended Defence.

9. The 1st Defendant has fulfilled her obligations under the Sale and Purchase Agreement but despite repeated reminders, the 1st Plaintiff has failed and/or refused to transfer the said property to the 1st Defendant and/or her nominees.

10. The 1st Plaintiff has threatened to breach the said Sale and Purchase Agreement by entering into a 2nd Sale and Purchase Agreement with the 2nd Plaintiff who had knowing of the 1st Defendant's interest in the said property induced and/or attempted to induce the 1st Plaintiff to breach the said Sale and Purchase Agreement with the 1st Defendant.

11. In the premises, the 1st Defendant prays that the claims of the 1st and 2nd Plaintiffs against her be dismissed with costs.

12. And the 1st Defendant claims against the 1st and 2nd Plaintiffs for the followings:

(i) a declaration that the 1st Defendant or her nominees is beneficially and legally entitled to the said property;

(ii) an Order that the 1st Plaintiff convey the said property to the 1st Defendant free from all encumbrance;

(iii) alternatively, an Order that the Caveat of the 2nd Plaintiff and registered at the Miri Land Registry as Instrument No. L. 4588/1991 be removed;

(iv) costs of this action and counterclaim; and

(v) any further or other Order as this Honourable Court shall in the circumstances deems fit and proper.

[4] The amended defence of the 2nd to 7th defendants reads: A

1. Paragraph 1 of the statement of claim is admitted. Further the Defendants aver that the 1st Plaintiff is a bare Trustee for the Defendants.

2. Paragraphs 2 and 3 of the statement of claim are admitted. B

3. With reference to paragraphs 4 and 5 of the statement of claim, the Defendants aver that the 1st Defendant had fully complied with the terms and conditions stated in the agreement. Further the Defendants aver that the allegation that there was non-payment of the $7,000.00 or alternatively $5,000.00 is true (the Defendants deny) the claim is Statutory barred under the Limitation Ordinance and it is bad in law for the 1st Plaintiff to seek for a declaration where the Plaintiff could not sue for the payment of the $7,000.00 or alternatively $5,000.00 because it is statutory barred. C D

4. With reference to paragraph 6 of the statement of claim, the Defendants deny that the 1st Defendant was in breach of the agreement. Further the Defendants admitted that no Caveat was lodged by Mr. S.C. Yee immediately after the execution of the agreement on the 28th day of August, 1981. The Defendants could not register the Memorandum of Transfer in 1983 because there was Caveat lodged by Labour Department under Instrument No. L. 1119/1967. E

4.1 Only on the 17th day of October, 1991 when Mr. S. C Yee heard that the 1st Plaintiff in collusion with the 2nd Plaintiff entered into a Sale and Purchase Agreement on or about 27th day of July, 1991, a Caveat was lodged. The 2nd Plaintiff knew that the 1st Plaintiff was a bare Trustee by taking advantage of the fact that no caveat was lodged by the Defendants before 27th day of July, 1991, more particularly as follows: F G

(a) the sequence of the events leading towards this action in that the Plaintiffs entered into the purported Sale and Purchase Agreement on the 22nd day of July, 1991 and a Caveat was lodged on next day 23rd day of July, 1991. Only after lodging the Caveat, the 1st Plaintiff wrote to the 1st Defendant purported to terminate the Sale and Purchase Agreement dated the 29th day of August 1981. H

(b) At the time of making the Sale and Purchase between the Plaintiffs, the Plaintiffs expected that the 1st Defendant would also conspire with them to defeat the interest of the Defendants. I

(c) In November, 1992 the 2nd Plaintiff approached the 1st Defendant's husband, David Lee Seng Chai and offered to pay him a large sum of money if he cooperate with him but the said David Lee refused.

5. With reference to paragraph 7 of the Defendants admitted that the 1st Plaintiff wrote a letter to the 1st Defendant but deny that the purported rescission is good in laws.

6. Paragraph 6 of the statement of claim is admitted. Further the Defendants aver that the Memorandum of Transfer was prepared and executed in front of the lawyer Mr. S.C. Yee on the 13th day of January, 1983.

7. With reference to paragraph 9 of the statement of claim, the Defendant admitted that no payment of RM80,000.00 was made to the 1st Plaintiff upon the execution of the Memorandum of Transfer for the reason that at that material time, on the 13th day of January, 1983, the 1st Defendant was signing the Memorandum of Transfer as bare Trustee for the 1st Defendant and the beneficial owner for the RM80,000.00 was the 1st Defendant because on the 28th day of August, 1981 when the 1st Defendant made full payment of the purchase price the 1st Plaintiff was unable to register the Memorandum of Transfer as there was a Caveat lodged by Labour Department under Instrument No. L. 1119/1967.

8. With reference to paragraph 10 of the statement of claim, the Defendants repeat paragraph 9 of the Defence.

Further, the Defendants aver that the Memorandum of Transfer dated 13th day of January, 1983 was fully explained by Mr. S.C. Yee.

9. With reference to paragraph 11 of the statement of claim, the Defendants repeat paragraph 9 of the Defence.

10. With reference to paragraphs 11.1 and 11.2, the Defendants admitted that they bought the said land from the 1st Defendant on the 13th day of January, 1983 because at that material time the 1st Plaintiff was a Trustee for the 1st Defendant and because of the Labour Department's Caveat under Instrument No. L. 1119/1967 the 1st Defendant had to execute the Memorandum of Transfer and in fact and the 1st Plaintiff did.

11. Paragraph 13 is denied and put the Plaintiffs into strict proof thereof.

12. With reference to paragraph 14 of the statement of claim, the Defendants aver that the 1st Plaintiff already divest all his interest in the land to Defendants that he had nothing to sell. Alternatively, the purported agreement is only a conditional agreement. Until the conditions are fulfilled the agreement is ineffective. Paragraph 6 of the purported agreement stated that in the event that if the 1st Plaintiff did receive full payment from the 1st Defendant then the agreement is ineffective and the 1st Plaintiff should refund the RM5,000.00 to the 2nd Plaintiff.

13. No admission is made to paragraph 15. Further the purported Memorandum of Transfer does not pass any interest to the 2nd Plaintiff for the reason that there was nothing to sell by the 1st Plaintiff and it was only partial payment (if any) was made.

14. Paragraph 16 of the statement of claim is denied and put the Plaintiffs into strict proof thereof.

15. Paragraphs 17, 18 and 19 of the statement of claim are denied. Further the Defendants aver that the 2nd Plaintiff was not a *bona fide* purchase for value without notice and repeat the defence hereof.

16. Save as is hereinbefore expressly admitted the Defendants denies each and every allegation contained in the statement of claim as if the same were set forth herein and specifically traversed.

[5] The learned trial judge in his judgment stated as follows:

From the pleadings I agree with the learned counsel for the Plaintiffs that the main issues for determination by this Court are as follows:

(1) Whether the 1st Plaintiff is a bare trustee of the 1st Defendant?

(2) Whether there was a breach of sale and purchase agreement dated 29.8.81 by the 1st Defendant? Whether the said agreement was rescinded by the 1st Plaintiff?

(3) Whether the Memorandum of Transfer dated 13.1.83 was void as against public policy?

(4) Did the said Memorandum of Transfer dated 13.1.83 pass any interest to the 2nd to 7th Defendants?

(5) Is the 1st Plaintiff barred from contradicting the sale and purchase agreement dated 29.8.81?

(6) Are the 1st Defendant's claims under prayer (1) and (2) time-barred? Is the 1st Defendant precluded from claiming them?

(7) Are 1st Plaintiff's claims time-barred?

(8) Is the Sale and Purchase Agreement dated 22.7.91 a conditional agreement?

(9) Whether the 2nd Plaintiff has a beneficial interest in the said land under the Sale and Purchase Agreement dated 22.7.91? Whether it should rank in priority over the interest, if any, of the 2nd to 7th Defendants?

In addition, the learned counsel for the 2nd to 7th Defendants has raised several issues in his submission. The first point raised by the learned counsel for the 2nd to 7th Defendants is that the 2nd to 7th Defendants are *bona fide* purchaser for value and the allegation of the non-payment of purchase price was only against the 1st Defendant. The 2nd to 7th Defendants are holders of an executed Memorandum of Transfer in statutory forms. In fact the stamp duties in the sum of RM4,290.00 for the Memorandum of Transfer have already being paid. If not for the 1st Plaintiff's caveat the Memorandum of Transfer would have been registered. In view of the above fact he submitted that the Plaintiffs have no case whatsoever against the 2nd to 7th Defendants.

In reply to that the learned counsel for the Plaintiffs submitted that at the time the 1st Defendant sold the land to 2nd to 7th Defendants, the 1st Plaintiff was not a bare trustee of the 1st Defendant because of the nonpayment of the full consideration under Clause 1(c) of the said agreement and also because the Memorandum of Transfer dated 28th day of August 1981 was void for want of consideration and therefore was not registrable. The 2nd to 7th Defendants therefore did not obtain any interest, legal or equitable under the said Memorandum of Transfer.

[6] The learned judge's finding on the issues are as follows:

Issue (1): Is the 1st Plaintiff a bare trustee of the 1st Defendant?

It is not in dispute that there were two transactions involving the 1st Plaintiff and the 1st Defendant, namely, the Memorandum of Transfer dated 28.8.81 and the Sale and Purchase Agreement dated 29.8.81. Both the 1st Defendant and the 2nd to 7th Defendants rest their cases of bare trusteeship on these transactions. The 1st Plaintiff's case is that he was not paid the

full consideration mentioned in Clause 1(c) of the said agreement. Therefore, the issue of bare trusteeship may be decided by reference to the tests laid down in *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* [1996] 2 MLJ 12 and by asking the questions:

(i) Did the 1st Plaintiff receive in full the consideration in cash and kind as stated in Clauses 1(a), (b) and (c) of the said agreement?

(ii) Did he execute a registrable Memorandum of Transfer in favour of the 1st Defendant?

...

On this issue it is my finding that, after evaluating the evidence given by the witnesses for both sides, the said sum of RM4,000.00 was not paid to the 1st Plaintiff. I agree with the submission and the reasons put forth by the learned counsel for the Plaintiffs that the evidence of DWl, DW2 and DW4 on the alleged payment of RM4,000.00 is riddled with serious unexplained discrepancies. As such there is a doubt as to whether any of them is telling the truth.

The next point for determination is whether the sum of RM7,000.00 under Clause 1(c) of the said agreement had been paid to the 1st Plaintiff by the 1st Defendant.

Under Clause 1(c) of the said agreement, from the sum of RM7,000.00, DWl was to retain RM2,000.00 for spraying the car red, check the engine and renew the road tax. According to the 1" Plaintiff, when he received the car, he noticed that it was sprayed red and the road tax renewed but he was never paid RM5.000.00. According to DWl, Rose Foo, the sum of RM7,000.00 in cash was paid through lawyer Yee in the latter's office and similar evidence was given by her husband DW2 and lawyer Yee, DW4. Thus, there is a conflict of evidence on whether the stipulation of consideration as regards RM7,000.00 was fulfilled.

...

I have my doubt on the accuracy of DW4's evidence regarding the payment of the sum of RM7,000.00 to the 1st Plaintiff as there was no record to support his evidence. This is because his evidence regarding the payment of RM4,000.00 contradicted the evidence of DWl and DW2. According to him the sum of RM4,000.00 was paid to the 1st Plaintiff on 28th August 1981 in his presence. However DW2 said in his evidence that the sum of

A RM4,000.00 was paid to the 1st Plaintiff 3 months prior to the signing of the said agreement. As such I am unable to believe the evidence of DW4 notwithstanding the fact that he is a very senior lawyer.

B After considering the evidence adduced by both sides on this issue it is my finding that the sum of RM7,000.00 had not been paid to the 1st Plaintiff by the 1st Defendant. I agree with the submission made by the learned counsel for the Plaintiffs. Accordingly I find that the 1st Plaintiff had not received the consideration in cash as stated in the said agreement.

C The next point to be decided is whether the 1st Plaintiff had executed a registrable Memorandum of Transfer in favour of the 1st Defendant. The learned counsel for the Plaintiffs submitted that the Memorandum of Transfer was void as it was made without consideration and it did not fall within any of the D exceptions of Section 26 of the Contract Act, 1950. As such no interest passed by virtue of it to the 1st Defendant.

I have decided earlier that the 1st Plaintiff had not received the consideration in cash. However the consideration in kind in the form of a motorcar and one rice machine had been given to the E 1st Plaintiff by the 1st Defendant. As such I am unable to agree with the learned counsel for the Plaintiffs that the Memorandum of Transfer was void as it was made without consideration. There was no total failure of consideration as part of the consideration had been given to the 1st Plaintiff. The facts in *Macon Works & F Trading Sdn Bhd v. Phang Hon Chin & Anor* [1976] 2 MLJ 177 can be distinguished from the facts in the instant case as in that case no consideration was given in the agreement.

Under the circumstances I am of the view that the Memorandum of Transfer was not void. It was therefore registrable. However G in view of the fact that the 1st Plaintiff had not received the full purchase price from the 1st Defendant the 1st Plaintiff could not be said to have divested himself of all the beneficial interest in his land. (See *Karuppiah Chettiar v. Subramaniam* [1971] 2 MLJ 116).

Issue (2): Whether there was a breach of the said agreement by H the 1st Defendant? Whether the said agreement was rescinded by the 1st Plaintiff?

I have decided that the 1st Defendant had not paid the money stated under Clause 1(c) of the said agreement. Accordingly I hold that the 1st Defendant had breached the said agreement. I

…

I am bound by the Supreme Court decision in *Rasiah Munusamy*'s case that the refusal to pay the balance of purchase price must be absolute. Based on that principle of law I will now consider the evidence adduced by both sides on this matter.

...

Having considered the evidence as a whole I have no doubt that the 1st Plaintiff did in fact make repeated demands on the 1st Defendant for the said sum. Since the period was too long ie, for almost 10 years it was my view that it would not have made any difference whether the 1st Plaintiff had given the 1st Defendant time for her to pay the said sum. This is because she was unwilling and would not have made payment for the sums stated under Clause 1(c) of the said agreement as her contention was that she had paid the said amount in full. As such I hold that the failure on the 1st Plaintiff's part to give notice to the 1st Defendant to make payment is not fatal for even if such notice was given, it would have been to no avail.

...

In addition, the stand taken by the 1st Defendant now is contradictory to her pleaded case and her case as presented in court that she had fulfilled all her obligations under the said agreement. As such I agree with the submission made by the learned counsel for the Plaintiffs that it is not open to the 1st Defendant to say that she could have fulfilled her obligation to pay the balance of the purchase price, if given the opportunity. If the 1st Defendant is allowed to advance such a case it would be a departure from her case as this was never pleaded.

For the foregoing reasons I hold that the 1st Plaintiff was entitled to rescind the said agreement notwithstanding that notice for payment was not given. Accordingly the said agreement was validly terminated by the 1st Plaintiff when the 1st Defendant received the letter from Messrs Khoo & Co. dated 29th July, 1991.

(3) Whether the Memorandum of Transfer dated 13.1.83 (Ex. P3) was void as against Public Policy

Under the Real Property Gains Tax Act, 1976, a real property gains tax is chargeable in accordance with the Act in respect of chargeable gain on the disposal of real property and there is a chargeable gain, where upon the disposal of the chargeable asset, the disposal price exceeds the acquisition price. (See Section 3 and 7(ii)(a)). By paragraphs 14 and 15(3)(ii) of the Schedule to the Act, the chargeable gain is deemed, to accrue on the date on

which the whole of the value of the consideration was received by the 1st Defendant. By Section 13(1), the chargeable person is required to submit returns specifying the asset disposed, the acquisition price and the disposal and all information necessary to determine these prices. The rates of tax applicable as set out in Schedule 5 of the Act.

…

In view of that decision I am unable to agree with the submission made by the learned counsel for the Defendants that for a contract to be illegal it is necessary that the act or dealing objected to must be prohibited by the Act itself. It is, in my view, sufficient if the object of such dealing is of such a nature if permitted, would defeat any law. In the present case the dealing has resulted in the loss of revenue for the government. This matter could be gathered from the evidence of DW4, the 1st Defendant's lawyer who stated in his evidence that:

> So I told her why don't transfer the land from Matair to the 6 purchasers and it would save on the real property gain tax and the stamp duty. Rose Foo agreed and so prepared this transfer.

This piece of evidence also showed that the 1st Defendant was fully aware what she was doing contrary to the counsel's contention that she had no mens rea or that she had left the matter to her lawyer. The decision to transfer the land direct from Matair to the 2nd to 7th Defendants was made by her. That piece of evidence also did not support the 1st Defendant's contention that she had no intention to evade the real property gains tax.

In *Napier v. National Business Agency Ltd.* [1951] 2 All ER 264, the plaintiff claimed for payment of £13 a week for a certain period, *in lieu* of notice, after he was summarily dismissed by his employer. The plaintiff was paid £13 a week as income with £6 as reimbursement for expenses, but, the £6 as expenses was not genuine although it was disclosed in the returns to the Inland Revenue Commissioners. In holding that the agreement as to expenses was contrary to public policy, His Lordship Sir Raymond Evershed, M.R. said at page 266:

> It must surely be that, by making an agreement in that form the parties to it were doing that which they must be taken to know would be liable to defeat the proper claims of the Inland Revenue and to avoid altogether, or at least to postpone, the proper payment of income tax. If that is the right conclusion, it seems to me equally clear … that the agreement must be regarded as contrary to public

> policy. There is a strong legal obligation placed on all citizens to make true and faithful returns for tax purposes, and, if parties make an agreement which is designed to do the contrary, ie, to mislead and to delay, it seems to me impossible for this court to enforce that contract at the suit of one party to it.

Under the circumstances I am of the view that the dealing under exhibit P3 if permitted would defeat the Real Property Gains Act and as such it is impossible for this court to countenance such dealing. The dealing is therefore void.

On the claim by the 2nd to 7th Defendants that they are not a party to any illegality in the said dealing I am also of the view that there is no merit in that. This is because from the evidence given by the 5th Defendant it is clear that it was also the idea of the 5th Defendant that the land be transferred to them from the 1st Plaintiff. This is what he said under cross-examination by the learned counsel for the Plaintiffs:

> I do not know about the procedure but what I know is I bought the land from Rose Foo and I wanted the money to be paid to Rose Foo and I wanted the land to be transferred from the original land owner.

As such it cannot be disputed that the 5th Defendant was also a party to such dealing.

I am also of the view that it is misleading for the learned counsel for the 2nd to 7th Defendants to rely upon the passages from *Kho Kwong Choon v. Phuman Singh* [1968] 1 MLJ 183 at page 184 and *Pappa v. Saminathan* for the proposition that illegality will not defeat the 2nd to 7th Defendant's interest. These passages are inapplicable to the facts of this case. The proposition applies only to interest which have been registered and are subject to statutory protection. It cannot apply to our case because the 2nd to 7th Defendants' interest have yet to be registered and is not protected by the indefeasibility provisions of the Land Code. It has been established that the purpose of the transfer sought to be enforced by the 2nd to 7th Defendants is to defeat the object of the Real Property Gains Tax Act, 1976, by causing a loss of revenue to the government. Once illegality is brought to the attention of the Court, its duty is to prevent the enforcement of the transfer.

(4) Did the said Memorandum of Transfer dated 13.1.83 (Ex. P3) pass any interest to the 2nd to 7th Defendants?

Regarding this issue the learned counsel for the Plaintiffs submitted that the said Memorandum of Transfer was incapable of passing any interest, legal or equitable to the 2nd to 7th Defendants as the transfer was void for want or failure of consideration. From the evidence it is clear that the consideration of RM80,000 was paid to the 1st Defendant and not to the 1st Plaintiff and the transfer was executed in favour of the 2nd to 7th Defendants not as nominees of the 1st Defendant.

The learned counsel for the 2nd to 7th Defendants submitted that under Section 134 of the Land Code a document can be set aside only in the case of actual fraud. According to him in our instant there was no allegation of fraud and therefore once the Memorandum of Transfer dated 13th day of January 1983 was executed the 1st Plaintiff is not entitled to set it aside. It is further argued by the learned counsel that as a holder of an executed statutory instrument, namely the Memorandum of Transfer between the 1st Plaintiff and the 1st Defendant dated 28th day of August, 1981 the 1st Defendant had the assignable right to the said land.

According to him as a trustee the 1st Plaintiff is not entitled to the RM80,000.00 which was paid to the 1st Defendant by the 2nd to 7th Defendants. The 1st Plaintiff may argue that he did not receive the full purchase price therefore he is not the trustee. However, equity will not allow such a contention because at the time when the 1st Plaintiff signed the Memorandum of Transfer (Ex. P3) on 13.1.1983 the 1st Plaintiff did not complain that he did not receive the full purchase price. It is submitted that anybody who read the sale and purchase agreement dated 29.8.1981 between the 1st Plaintiff and the 1st Defendant would understand that full purchase price had been paid. This would include the 2nd Plaintiff.

I agree with the contention made by the learned counsel for the 2nd to 7th Defendants that it is inequitable to allow the 1st Plaintiff to contend that the Memorandum of Transfer dated 13.1.83 did not pass any interest to the 2nd to 7th defendants as the transfer was void for want or failure of consideration because the said Memorandum of Transfer (Ex. P3) was signed by the Plaintiff on the 13th of January, 1983 which was about 1½ years after the sale and purchase agreement between the 1st Plaintiff and the 1st Defendant was signed and when signing (Ex. P3) the 1st Plaintiff did not complain that he did not receive the full purchase price. It is my view that anybody who read the said sale

and purchase agreement dated 29th of August 1981 would have come to the conclusion that full purchase price had been paid over the transaction. Furthermore the 1st Plaintiff filed this application for a declaration that the said Memorandum of Transfer (Ex. P3) is null and void only in November 1992 which was more than 9 years after he signed that Memorandum. Surely there is a delay on the 1st Plaintiff's part to assert his claim.

(5) Is the 1st Plaintiff barred from contradicting the sale and purchase agreement dated 29.8.81?

By paragraph 4 of her Amended Defence and Counterclaim, the 1st Defendant alleges that "the 1st Plaintiff is now estopped from alleging a breach of terms of the said agreement as the 1st Plaintiff had admitted to signing the same and to being bound by the provisions therein". In effect, the 1st Defendant is relying on the principle that parole evidence cannot be received to contradict, vary, add or subtract from the terms of a written contract. See Section 92 of the Evidence Act, 1956.

This Defence is directed at the 1st Plaintiff's assertion that there was a failure of part of the consideration represented by the sums of RM4,000.00 and RM7,000.00 stipulated in Clause 1(c) of the said agreement.

It is my view that this defence is devoid of merits on the ground that under proviso (a) of Section 92 the 1st Plaintiff is entitled to prove by oral evidence that the consideration in cash in the sums of RM4,000.00 and RM7,000.00 was not paid and that this part of the consideration failed. (See *Sarkar on Evidence* (14th Ed.) pages 1240-1242).

(6) Are the 1st Defendant's claims under prayer (1) and (2) timebarred? Is the 1st Defendant precluded from claiming them.

By her Amended Defence and Counterclaim the 1st Defendant is counterclaiming against the 1st and 2nd Plaintiffs for:

(i) a declaration that the 1st Defendant or her nominees are beneficially or and legally entitled to the said property, and

(ii) an order that the 1st Plaintiff convey the said property to the 1st Defendant free from encumberances.

Under Item 90 of the Schedule to the Limitation Ordinance (Cap. 49) the limitation period for commencing an action for specific performance is 3 years from the date "the plaintiff has notice that performance is refused.

According to the learned counsel for the Plaintiffs by both the reliefs the 1st Defendant is praying for specific performance of the said agreement. This agreement was rescinded by the 1st Plaintiff on 22.7.91 when he made the alternative agreement with the 2nd Plaintiff or at the latest on 29.7.91 when the notice of termination was given to the 1st Defendant by the letter from Messrs Khoo & Company. Therefore, the limitation period ran from 29.7.91 and expired on 29.7.94. However, the counterclaim of the 1st Defendant was filed one and half years' late on 10.10.96. It was time-barred when it was commenced.

On this issue I agree with the submission made by the learned counsel for the Plaintiffs that the 1st Defendant's claims under prayer (1) and (2) of her counterclaim are time-barred and as such she is precluded from claiming them. I agree that the limitation period of 3 years as stated under Item 90 of the schedule to the Limitation Ordinance is applicable to the 1st Defendant's claims. The limitation period ran from 29.7.91 when the notice of termination was given to the 1st Defendant by the letter from Messrs Khoo & Company.

(7) Are the 1st Plaintiff's claims time-barred?

In paragraph 3 of their Amended Defence the 2nd to 7th Defendants raised a plea of limitation in the following terms:

> Further the Defendants aver that if the allegation that there was non-payment of the $7,000.00 or alternatively $5,000.00 is true (the Defendants deny) the claim is Statutory barred under the Limitation Ordinance and it is bad in law for the 1st Plaintiff to seek for a declaration where the Plaintiff could not sue for the payment of the $7,000.00.

It is my view that there is no merit in such contention made by the 2nd to 7th Defendants. This is because I have decided that the 1st Plaintiff had lawfully terminated his contract with the 1st Defendant on 29.7.91. He filed this action on 3.11.92. As such the 1st Plaintiff was within the periods set out in Item 92 and 97 of the Schedule to the Limitation Ordinance and is not time-barred.

(8) Is the Sale and Purchase Agreement dated 22.7.91 a conditional agreement?

It is the contention of the 2nd to 7th Defendants that Clause 6 of the said second agreement which stipulates that the deposit of RM5,000.00 was to be refunded to the 2nd Plaintiff in the event that the 1st Plaintiff received full payment or Rose Foo could

prove she had fully complied with the terms of the agreement dated 29.8.91 makes the said second agreement conditional and it could not pass any interest to the 2nd Plaintiff.

On this issue I agree with the learned counsel for the Plaintiffs that Clause 6 cannot be considered in isolation and in interpreting it the whole contract must be considered. In my view the said Clause 6 is merely a term of the contract and it does not operate as a condition precedent to the formation of the said contract.

From the express language of Clause 6, it merely provides for the refund of RM5,000.00 upon the occurrence of a specified event. Any other construction will cause violence to its language and disharmony with other clauses, in particular, with the stipulations in Clauses 7 and 12. If Clause 6 were to operate as a condition precedent as to the formation of the agreement, then Clauses 7 and 12 will be rendered superfluous. Why was there a need to provide for an indemnity to the 2nd Plaintiff if the agreement for sale was not already entered or was contingent upon Rose Foo's interest in the land?

(9) Is 2nd Plaintiff beneficially interested in the land? Does it rank in priority?

I have already decided under issue number (4) that the Memorandum of Transfer dated 13.1.83 i.e. Ex. P3 did not pass any interest to the 2nd to 7th Defendants as it was void on ground of illegality. As such the question of priorities of equities does not arise.

In addition to the issues mentioned above there are other issues raised by the learned counsel for the 2nd to 7th Defendants. He submitted that the declaration prayed for by the Plaintiffs should not be granted because the prayers asked in the Statement of Claim are against the well established principles of laws in the following aspects:

(a) action for the balance of purchase price is statutory barred;

(b) the purported rescission is invalid in laws;

(c) the conduct of the Plaintiffs are inequitable.

I have already considered and made my decision on issues (a) and (b) and that means I only need to consider issue (c). According to the learned counsel the Plaintiff is estopped from seeking for the declaration against the 1st Defendant under prayer 1 that the said agreement had been validly rescinded for the simple reason that it was the 1st Plaintiff who signed the Memorandum of Transfer (Ex. P3) in favour of 2nd to 7th

Defendants and 2nd to 7th Defendants relied on the Memorandum of Transfer and paid the RM80,000.00 to the 1st Defendant. It was the contention of the learned counsel for the 2nd to 7th Defendants that the conduct or representation of the 1st Plaintiff clearly had caused the 2nd to 7th Defendants to act to their detriment.

It was also submitted by the learned counsel for the 2nd to 7th Defendants that in view of the fact that the 1st Defendant had already sold the said land to the 2nd to 7th Defendants all the 1st Plaintiff entitled to is to claim for the balance of purchase price and not rescission.

It was also submitted that it is inequitable to grant declarations in favour of the Plaintiffs because the 1st Plaintiff had obtained 3 sets of payment for the same piece of land, namely:

(i) Under the said agreement he received one motorcar and one rice machine together with RM11,000.00 cash;

(ii) From the 2nd Plaintiff he received a sum of RM5,000.00 for the same parcel of land;

(iii) From the 2nd to 7th Defendants he received RM13,000.00 for the abortive settlement. The 1st Plaintiff repudiated the purported settlement but still keeps RM13,000.00.

In addition the learned counsel for the 1st Defendant submitted that restitutio in integrum is impossible if the agreement is rescinded.

I am fully aware that declaration is an equitable remedy and equitable defence is available to the Defendants. One of the 12 maxims stated by *Snell's Principles of Equity* (26th Ed) is that "he who seeks equity must do equity". At page 34 it was stated:

> He who seeks equity must do equity. To obtain equitable relief the Plaintiff must be prepared to do "equity", in its popular sense of what is right and fair to the Defendant. This is a rule of "unquestionable justice" which, however, "decides nothing in itself; for you must first inquire what are the equities which the Defendant must do, and what the plaintiff ought to have.

I have given a careful consideration to the facts of this case and it is my view that it is inequitable to grant the declarations sought for by the 1st and 2nd Plaintiffs on the following grounds:

(i) The conduct or representation of the 1st Plaintiff clearly had caused the 2nd to 7th Defendants to act to their detriment. The 2nd to 7th Defendants paid to the 1st Defendant RM80,000.00 after the 1st Plaintiff signed exhibit P3. At no time did the 1st Plaintiff indicate to the 2nd and 7th Defendants that he had not received the balance purchase price from the 1st Defendant. Anybody reading the said agreement would come to a conclusion that the sale of the said land to the 1st Defendant was in order. Furthermore the 1st Plaintiff had been sleeping on his rights all along. The said agreement was made on 29th of August 1981 and exhibit P3 was made on 13th of January 1983.

However despite the non-payment of the balance purchase price by the 1st Defendant the 1st Plaintiff only took action to terminate the said agreement in July 1991 which was almost 10 years later. This suit was only filed in 1992.

(ii) The 1st Plaintiff had received RM13.000.00 from the 2nd to 7th Defendants. According to the 1st Plaintiff the amount remains unpaid by the 1st Defendant is only RM9,000.00. As such the 1st Plaintiff had been compensated for his loss.

(iii) I agree with the learned counsel for the 1st Defendant that restitutio in integrum is almost impossible in this case as the rice machine and the used car were transferred to the 1st Plaintiff from the 1st Defendant in 1981.

For the reasons stated above I refuse to exercise my discretion to grant the declarations sought by the Plaintiffs and accordingly I dismiss the Plaintiffs' claims. As regards the costs, in view of my finding that the 1st Plaintiff has proved his case but for the fact that it is inequitable to grant the declarations prayed for by the 1st Plaintiff I order that each party to bear its own cost.

As regards the counterclaim by the 1st Defendant I hold that there is no merit in her claim. I therefore dismiss her counterclaim against the 1st Plaintiff with costs.

[7] It is necessary for me to go at great length into the relevant part of the learned judge's judgment for the reasons I will state later. Let me deal first as to what transpired during the hearing of this appeal.

[8] When this appeal was called, the learned counsel for the 1st defendant, Mr. C.T. Voon stood up and addressed the court. He informed the court that there was a motion (encl. (14a)) which was an application by him to discharge himself from acting for the

A 1st defendant. He also informed the court that he was not able to serve the application on the 1st defendant. The application was sent to the last known address of the 1st defendant but she was not at the said address anymore. Furthermore, he tried to trace the 1st defendant everywhere in Sarawak but was not successful. B The court inquired from the counsel for the other defendants, Mr. K.Y. Lin, and the response from him was that he and the other defendants did not know the whereabout of the 1st defendant. The learned counsel for the plaintiffs, Mr. M.S. Sandhu, insisted that the appeal should go on for the simple reason that this case C had been long outstanding and his client is very old and sickly and the subject matter arose in 1983. Since there was no indication from the parties that there was a likelihood that the 1st defendant could be traced in the near future, it was decided by the three of us that the appeal should be proceeded upon. As a D result of that, the learned counsel for the 1st defendant withdrew the motion, encl. 14(a). The court then struck off the motion with no order as to costs.

[9] In his submission, the learned counsel for the plaintiffs E stated that there are three appeals before the court. The first is the substantive appeal by the plaintiffs. There are two cross-appeals, one by the 1st defendant and the other by the rest of the defendants.

F **[10]** The learned counsel for the plaintiffs in his submission said that the trial in the court below was a full trial. At the end of the trial the learned trial judge made the following findings:

(1) that the unregistered memorandum of transfer (exh. P3) was void as against the public policy on the ground that it was an G illegal dealing to evade real property gains tax and that both the 1st defendant and the 2nd to 7th defendants were parties to it;

(2) that the memorandum of transfer (exh. P3) did not pass any H interest to the 2nd to 7th defendants as it was void on ground of illegality;

(3) that the agreement dated 29 August 1981 was validly terminated by the 1st plaintiff; and

I (4) that the agreement dated 22 July 1991 between the 1st plaintiff and the 2nd plaintiff was not a conditional agreement.

[11] It was contended by the plaintiffs that one of the consequences, after the above finding of facts by the learned judge, would be the order to remove the caveats lodged by the defendants. The learned judge did not make the order of removing the caveats.

[12] The learned counsel for the 1st defendant stated that since he had not received any instruction from the 1st defendant, it is not proper for him to do any submission on behalf of the 1st defendant. In our view, he is right in doing so. Since the 1st defendant did not make any submission in respect of this appeal, the learned counsel for the 2nd to 7th defendants (hereinafter referred to as "the other defendants") was not able to submit on the caveat.

[13] Before us, the learned counsel for the plaintiffs raised the following issues:

(1) error of law in refusing to declare agreement validly rescinded (grounds 1, 2, 5, 6, 7, 8 and 10);

(2) error in refusing to remove caveat lodged by the 1st defendant; and

(3) error in refusing relief to the 2nd plaintiff.

Error Of Law In Refusing To Declare Agreement Validly Rescinded (Grounds 1, 2, 5, 6, 7, 8 And 10)

[14] The learned judge in his judgment found that the 1st defendant had not paid the balance of the money stipulated under cl. 1(c) of the Sale and Purchase Agreement dated 29 August 1981 (see his judgment cited above) and he held that: (1) the 1st defendant had breached the said agreement; and (2) the said agreement had been validly terminated by the 1st plaintiff by a letter dated 29 July 1991. Yet the learned judge refused to grant the order of declaration sought by the plaintiffs. His refusal was on the ground that the conduct of the 1st plaintiff was inequitable in that the 1st plaintiff failed to inform the other defendants of non-payment of full purchase price, inordinate delay in terminating the agreement, receipt of the RM13,000 and on *restitutio in integrum.*

[15] From the evidence, the claim by the other defendants was on a purported agreement between the 1st defendant and the other defendants. The statement of defence and counterclaim of the 1st defendant denied any dealing between the 1st defendant and the other defendants and it could not be found anywhere in the statement of defence and counterclaim of the other defendants which challenged the denial. The parties are bound by their pleadings and for that reason the other defendants could not have any claim on the said land. Secondly, it is observed that the agreement between the 1st defendant and the other defendants (if any) would depend on whether there was a valid and binding agreement between the 1st plaintiff and the 1st defendant in respect of the said land. The learned trial judge held that the agreement dated 29 August 1981 between the 1st plaintiff and the 1st defendant was void for want of consideration and the 1st plaintiff had validly terminated the said agreement. The said land is the subject matter of the agreement and since the agreement had been declared null and void the ownership of the said land never passed to the 1st defendant. For that reason the 1st defendant could not enter into any agreement with any party in respect of the said land. In my view, whatever agreement entered between the 1st defendant and the other defendants would have no effect whatsoever. Furthermore, there is nothing in the evidence to show that when the 1st defendant entered into the purported agreement with the other defendants the 1st plaintiff was a party to the purported agreement. For that reason there was no obligation on the part of the 1st plaintiff to inform the other defendants that the balance of the purchase money had not been paid.

[16] The learned counsel for the other defendants submitted that the learned judge was correct in not exercising his discretion to grant the plaintiffs the declaration sought by the plaintiffs on the ground that the conduct of the plaintiffs were inequitable. The learned judge found that the 1st plaintiff's conduct was inequitable because he did not inform the other defendants that the balance of the purchase money had not been paid by the 1st defendant and the 1st plaintiff delayed in terminating the agreement. As I have stated above, the other defendants were not a party to the agreement dated 29 August 1981 and as such the 1st plaintiff was not under a duty or obligation to inform the other defendants of the non-payment of the balance of the purchase price. The

obligation was with the 1st defendant with whom the other defendants entered into the purported agreement. The learned judge also accepted the 1st defendant's submission that *restitutio in integrum* is almost impossible in this case as the rice machine and the used car could not be valued. I agree with the learned counsel for the plaintiffs that there should be value given to those articles when the sale and purchase agreement dated 29 August 1981 was executed. The husband of the 1st defendant gave evidence that the value of those articles at the time when the agreement was entered was about RM60,000 to RM70,000. If there is any restitution that would be the amount. It is noted that the learned judge found that the breach was by the 1st defendant and in the absence of any clause for refund of any stipulated sum, in my view, the 1st plaintiff is entitled to forfeit the whole amount. Further, I could not find anywhere in the statement of defence of the 1st defendant seeking the refund of the money paid.

[17] The point I would like to point out here is that there is no evidence to show that the 1st plaintiff's conduct was inequitable and that *restitutio in integrum* could not be ordered. Even if the learned judge was right in both, I am of the view that he was in error in not granting the declaratory order prayed for because the learned judge himself found that the 1st plaintiff had validly terminated the agreement. The normal sequence of a finding that the agreement had been validly terminated by the 1st plaintiff would be a declaratory order pronouncing that the agreement had been validly terminated.

Error In Refusing To Remove Caveat Lodged By 1st Defendant

[18] This is another puzzling part of the judgment of the learned judge. The learned judge in his judgment found that the 1st plaintiff had validly terminated the agreement when the 1st plaintiff's solicitors, by their letter dated 29 July 1991, rescinded the agreement for non-payment of the balance of the purchase price. With the termination of the said agreement, the interest of the 1st defendant in respect of the said land disappeared. For that reason the 1st defendant has no caveatable interest on the said land. The natural sequence would be an order that the caveat lodged by the 1st defendant should be removed.

[19] I am of the view that the learned judge was in error in refusing to remove the caveat filed by the 1st defendant.

A **Error In Refusing Relief To The 2nd Plaintiff**

[20] It was submitted by the learned counsel for the plaintiffs that when the learned judge came to the conclusion that the Sale and Purchase Agreement dated 22 July 1991 entered into by the
B 1st plaintiff and the 2nd plaintiff was not contingent on the 1st defendant's interest on the land, the learned judge ought to have held that the 2nd plaintiff has beneficial interest on the said land.

[21] I am of the view that the learned judge was right in not making the declaratory order prayed for by the 2nd plaintiff
C (prayer 2(i)). It is clear from the evidence that when the solicitors for the 1st plaintiff gave notice of termination to the 1st defendant, the 1st defendant disputed the termination. The termination became final only when the court found that the 1st plaintiff had validly terminated the agreement for breaches by the 1st
D defendant. The agreement between the 1st plaintiff and the 2nd defendant was dated 22 July 1991. On that date the agreement dated 29 August 1981 was still subsisting until it was held by the court to be validly terminated by the 1st plaintiff. For that reason the 1st plaintiff could not enter into any agreement with any party
E including the 2nd plaintiff. As such, we see no merit in the submission of the 2nd plaintiff.

Conclusion

F **[22]** As we have stated our decision in open court, the appeal by the plaintiffs is hereby allowed with costs here and below and the counter-appeals by the 1st defendant and the other defendants are hereby dismissed. The 1st plaintiff is entitled to the following:

G (1) as against the 1st defendant, a declaration that the agreement dated 29 August 1981 made between the 1st plaintiff and the 1st defendant has been validly rescinded;

(2) as against the 2nd to 7th defendants, a declaration that the unregistered Memorandum of Transfer dated 13 January 1983
H is null and void;

(3) a declaration that the 2nd to 7th defendants do not have any interest in the said land;

I (4) an order that the caveat lodged by the 1st defendant against the said land and registered at the Miri Land Registry Office on the 17thday of October, 1991 as Instrument No. L. 6729/91 be removed forthwith;

(5) an order that the caveat lodged by the 2nd to 7th defendants and registered at the Miri Land Registry Office on the 5th day of March, 1992 as Instrument No. L. 1544/92 be removed forthwith; and

(6) an order that, the 1st defendant or 2nd to 7th defendants or any one or more of them having custody of the issue document of title to the said land, do deliver the document of title to the 1st plaintiff within 14 days from the date of the order.

[23] In respect of the appeal by the 2nd plaintiff, it is clear to me that when the agreement between the 1st plaintiff and the 2nd plaintiff was executed the agreement dated 29 August 1981 had not been validly terminated. For that reason the 2nd plaintiff has no cause of action against the defendants. The appeal by the 2nd plaintiff is hereby dismissed with no order as to costs. The deposit is to be refunded to the plaintiffs.

[24] My learned brothers, James Foong Cheng Yuen and Zulkefli Ahmad Makinudin, JJCA have seen this judgment in the draft and have stated their agreement to it.